UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.

Plaintiff,

v.

Civil Action No. 95-0133 (RCL/JMF)

UNITED STATES DEPARTMENT OF COMMERCE,

Defendant.

MEMORANDUM ORDER

A deposition of John Huang was taken on October 29, 1996. Initially, Judge Lamberth ruled that it could be continued upon written questions but has since vacated that order, ruling instead, that the deposition may be continued in the ordinary course. Judge Lamberth designated me to supervise discovery in this case and has required me, incident to that responsibility, to preside in person over all depositions, including the deposition of Huang.

On April 12, 1999, Huang moved to quash the subpoena which compelled his attendance at that deposition on various grounds. After consulting with Judge Lamberth, I denied Huang's motion to quash and the deposition commenced. Huang, however, asserted his privilege not to incriminate himself when plaintiff's counsel began to interrogate him. I adjourned the deposition and asked the parties to brief the legal questions presented: (1) whether by subjecting himself to the 1996 deposition without ever claiming his Fifth Amendment privilege Huang waived it, and (2) whether I have the authority to evaluate and adjudge Huang's reliance on the Fifth Amendment on a question-by-question basis.

Plaintiff ("Judicial Watch") insists that Huang's prior deposition constitutes a waiver, but Huang and the Department of Commerce ("Commerce") disagree and insist that, despite the earlier testimony, Huang's Fifth Amendment privilege protects him from being compelled to incriminate himself beyond any incrimination he provided in his initial testimony.

Huang and Commerce are right. The very cases upon which Judicial Watch has or must rely indicate that the waiver rule Judicial Watch invokes pertains only to an effort which would require the witness to do no more or less than repeat what the witness has already said when it is absolutely certain that his repetition cannot subject him to any greater potential incrimination than he is already subject to by virtue of his initial statement. If the danger of incrimination increases in any way whatsoever, the waiver argument fails. Rogers v. United States, 340 U.S. 367, 373 (1951)(whenever privilege is claimed court is required to determine whether question presents a reasonable danger of further crimination in light of all circumstances, including previous disclosures); Ellis v. United States, 416 F.2d 791, 804 (D.C. Cir. 1968)(waiver principle inapplicable if inquiry made into new matter of substance rather than mere repetition of what has been said). Accord: Tomlin v. United States, 680 A.2d 1020, 1022 (D.C. 1996)(construing this circuit's law; waiver inapplicable if inquiry into new matter of substance which might include exposure to risk of perjury based on testimony at earlier proceeding).

Indeed, acknowledgment that the waiver principle yields the moment a real danger of further incrimination arises is the only way in which the decisions in Ellis v. United States, supra, and United States v. Perkins, 138 F.3d 421 (D.C. Cir. 1998) can be understood. In Perkins, Hartwell, who had testified for the government at trial, had second thoughts after trial and wrote a letter recanting his testimony. When the time came for him to testify at a hearing as to that

recantation, he balked, and upon the advice of counsel, claimed his Fifth Amendment protection. If, as Judicial Watch has suggested, his trial testimony waived his Fifth Amendment privilege because of a failure to claim it timely, he could have been forced to testify. Since, however, in doing so, he ran the risk of thereby providing evidence that his trial testimony was perjurious, his privilege was not waived merely by his trial testimony. As the Court of Appeals pointed out, the difference between Perkins' and Ellis' situations was that Perkins' testimony subjected him to real danger of further crimination while Ellis' mere repetition did not.

Applying this standard to Huang compels the conclusion that his prior testimony was not a waiver of any present right to claim his Fifth Amendment privilege. Surely, we have not gone to all this trouble so that Huang can be asked the very same questions he was asked in his first deposition. Inquiry into new matters, not the subject of identical questions, raise a new danger of crimination, despite the earlier testimony. Indeed, if we were so foolish as to permit Judicial Watch to ask him the same questions as were asked in the first deposition, the risk that a different answer subjects him to a possible perjury persecution suffices in itself to defeat the waiver argument. United States v. Wilcox, 450 F.2d 1131, 1141 (5th Cir. 1971), cert denied, 405 U.S. 917 (1972) quoted in United States v. Perkins, supra, 138 F.3d at 424.

As to my second question, the parties are agreed that I unquestionably have the duty to assess the validity of the privilege as to each question, sailing between the rock of improperly permitting the witness to define the application of the privilege and the hard place of forcing the witness to surrender the privilege to get it. Compare United States v. Hubbell, 167 F.3d 552, 580 (1999) with Hoffman v. United States, 341 U.S. 479, 486 (1951). I shall do so as to each question asked.

Thus, it is hereby

ORDERED that John Huang's deposition will continue before me on Thursday, April 15, 1999 at 10:00 a.m. and I will assess the validity of the privilege as to each question.

SO ORDERED.

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JOHN M. FACCIOLA
UNITED STATE MAGISTRATE JUDGE

April 14, 1999